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IN THE

# Supreme Court of the United States

REGAL CINEMAS, INC. and EASTGATE THEATRE, INC.,

*Petitioners*,

*v.*

KATHY STEWMON, TINA SMITH, and KATHY BRADDY,

*Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## *AMICI CURIAE* BRIEF OF NATIONAL ASSOCIATION OF THEATRE OWNERS, INC. AND NATIONAL ASSOCIATION OF THEATRE OWNERS OF CALIFORNIA/NEVADA, INC. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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## STATEMENT OF INTEREST OF *AMICI CURIAE* NATIONAL ASSOCIATION OF THEATRE OWNERS, INC. AND NATIONAL ASSOCIATION OF THEATRE OWNERS OF CALIFORNIA/NEVADA, INC.

This *amici curiae* brief is submitted on behalf of the National Association of Theatre Owners, Inc. ("NATO") and The National Association of Theatre Owners of California/Nevada, Inc. ("NATO of Cal/Nev").[1] NATO is the national trade association of the motion picture theatre industry. Its member operate over 26,000 motion picture screens located in all 50 states, including thousands of stadium-style auditoria. NATO's membership includes the largest theatre chains in the world, as well as hundreds of small independent theatre owners. NATO of Cal/Nev is the trade association of the motion picture theatre industry for theatres located in California and Nevada. NATO of Cal/Nev represents theatre owners operating more than 3,400 auditoria, including numerous stadium-style auditoria. NATO of Cal/Nev's members include the largest theatre chains in the world, as well as small independent theatre owners.

NATO and NATO of Cal/Nev have a substantial interest on behalf of their members in the issues raised in this case. NATO and NATO of Cal/Nev members currently operate thousands of stadium-style motion picture auditoria in the United States, and are in the process of constructing, or planning to construct, numerous additional stadium-style movie auditoria. Virtually all of the thousands of existing stadium-style motion picture auditoria were built after January 26, 1993, and thus are subject to the "new construction" accessibility requirements of the Americans With Disabilities Act, including Section 4.33.3 of the Department of Justice's ("DOJ") Standards for Accessible

1. Pursuant to Sup. Ct. R. 37.6, NATO and NATO of Cal/Nev certify that this *amici curiae* brief was authored in its entirety by NATO and NATO of Cal/Nev and their counsel. No other persons or entities made any monetary contribution to the preparation or submission of this brief. This *amici curiae* brief is being filed with the written consent of both parties. A copy of the letter agreement regarding consent to the filing of *amici curiae* briefs is being filed herewith.

Design, 28 C.F.R. Part 36, which set forth the requirements for the location of wheelchair seating in assembly areas.

Because their members are directly and significantly affected by the accessibility requirements of the Americans With Disabilities Act, Title III, 42 U.S.C. § 12181, *et seq.* ("ADA"), NATO and NATO of Cal/Nev have actively participated in the development of ADA rules and regulations applicable to motion picture theatres. When the notice of the initial rulemaking for ADA Accessibility Guidelines ("ADAAG") was first published in the Federal Register in January 1991, NATO held a series of industry-wide meetings and developed lengthy comments which were submitted to both the Access Board and the DOJ.[2] Thereafter, when the final ADAAG were published in July 1991, NATO met with DOJ staff to discuss the application of the accessibility guidelines generally, as well as Section 4.33.3 in particular, to the motion picture theatre industry. NATO's longstanding interest in the development and application of Section 4.33.3 reflects the critical importance of ensuring that all members of the industry understand the requirements imposed by the ADA prior to the design and construction of new theatres.

In addition, NATO has endeavored to work with both DOJ and the motion picture exhibition industry on ADA compliance issues, including the issues concerning Section 4.33.3 raised in this proceeding. When it became clear that DOJ was articulating a new interpretation of Section 4.33.3 to include the consideration of viewing angles and the subjective preferences of moviegoers, NATO filed a formal citizens'

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2. In its Notice of Proposed Rulemaking, DOJ proposed to adopt as binding regulations the final ADAAG Guidelines to be published by the Access Board, and directed all comments relating to new construction requirements to be sent to the Access Board. *See* Fed. Reg. 7452, 7478-79 (1991). DOJ was a member of the Access Board, and actively participated in drafting the ADAAG. *See* 56 Fed. Reg. at 35586. DOJ ultimately adopted the ADAAG verbatim as its own Standards for Accessible Design. The ADAAG are published at 36 C.F.R. Part 1191.

petition with the Attorney General requesting that DOJ initiate a rulemaking on the very issues raised in this case.[3] Although DOJ declined to initiate a rulemaking to address Section 4.33.3, NATO has actively participated in the Access Board's pending rulemaking to consider revisions to the ADAAG, including Section 4.33.3.[4]

Finally, NATO has closely monitored, and filed *amicus curiae* briefs in connection with, litigation involving the requirements of Section 4.33.3.[5] NATO of Cal/Nev joined with NATO in filing an *amici curiae* brief in the Ninth Circuit. NATO has also monitored DOJ's formal and informal enforcement efforts regarding Section 4.33.3, including the variety of interpretations of Section 4.33.3 advanced by DOJ. Moreover, NATO is familiar with the real world consequences that will necessarily follow if the decision below is upheld, including the enormous costs of retrofitting thousands of auditoria as well as the impossible uncertainty faced by architects and other design professionals when federal accessibility guidelines are vague, ambiguous and open to retroactive reinterpretation. It is essential that the writ of certiorari be granted so that the issues involved in these litigations can be decided once and for all, and so that theatre owners obtain clear guidance on how to build theatres that comply with the requirements of the ADA.

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3. A copy of NATO's Petition for Rulemaking, dated August 24, 1999, was included in NATO's *amicus curiae* brief before the Ninth Circuit, and is attached hereto as Appendix A for the Court's convenience.

4. A copy of DOJ's letter response to NATO's Petition for Rulemaking was included in NATO's *amicus curiae* brief before the Ninth Circuit, and is attached hereto as Appendix B for the Court's convenience.

5. NATO has filed *amicus curiae* briefs in *Lara v. Cinemark, USA*, 207 F.3d 783 (5th Cir. 2000); *Stewmon v. Regal Cinemas, Inc.*, 339 F.3d 1125 (9th Cir. 2003); *United States v. Cinemark USA*, 2003 Fed. App. 0395P (6th Cir. 2003); *Meineker v. Hoyts Cinemas Corp.*, No. 02-9034, 2003 WL 21510423 (2d Cir. July 1, 2003); and *United States v. Hoyts Cinemas Corp.*, No. 03-1646 (1st Cir.) (appeal pending).

## STATEMENT OF THE CASE

Congress mandated that DOJ's accessibility requirements, including Section 4.33.3, provide clear and unambiguous guidelines for operators of public accommodations to ensure both that ADA requirements can be designed into newly-constructed facilities and that the need for expensive retrofit construction can be avoided. The Ninth Circuit's decision in this case raises fundamental issues regarding the integrity of the regulatory processes mandated by Congress to implement the ADA as well as the judicial enforcement of those processes. For five long years, DOJ has been seeking to retroactively impose through litigation, a *post hoc* reinterpretation of Section 4.33.3 which would require the retrofit of thousands of motion picture theatre auditoria at enormous cost. At least 12 federal district and circuit courts have been called upon to interpret the "comparable lines of sight" language in Section 4.33.3. A fortune has already been spent litigating and relitigating the meaning of "comparable lines of sight," and yet the issue is no closer to resolution now than it was five years ago. All the while, there have been no clear or specific guidelines to govern the construction of new stadium-style theatres, and the motion picture exhibition industry has been forced to live under a sword of Damocles – a potential retrofit liability likely to be in the hundreds of millions of dollars.[6]

What makes this situation particularly unfortunate is that it could have been easily avoided. Congress clearly understood that the broadly-worded policy of nondiscrimination embodied in the ADA had the potential to impose enormous construction

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6. The design of stadium-style theatres has evolved over the last five years, as motion picture exhibitors have attempted to respond to the various concerns and conflicting interpretations advanced by DOJ in connection with litigation involving Section 4.33.3. However, good faith attempts by theatre owners to meet DOJ's concerns offer no safe harbor. The constantly changing formulations advanced by DOJ, the vague and subjective considerations on which they are based, and the possibility that DOJ's retroactive interpretations will continue to evolve, make it impossible to predict with any certainty whether any theatre design complies with the ADA.

and operational costs on industry. To ensure that real world considerations of feasibility, practicability and cost were duly considered in implementing the ADA, and to avoid the wasteful expense of retrofitting newly-constructed buildings, Congress established a regulatory process requiring notice and comment rulemaking, clear and specific guidelines for new construction, and ongoing technical assistance by the DOJ. If this regulatory process, mandated by Congress and the ADA itself, had been promptly employed to amend Section 4.33.3 when construction of stadium-style theatres first started, the issues presented here would have long ago been resolved with the issuance of a specific and unambiguous rule. The use of notice and comment rulemaking also would have helped to ensure that any revision to Section 4.33.3 reflected all points of view and was consistent with associated design considerations like safety.

There is nothing in the plain language of Section 4.33.3 or the history of its promulgation to suggest that the Access Board or DOJ intended to impose a "viewing angle" requirement in the placement of wheelchair seating in movie theatres. Similarly, there is nothing in the plain language of Section 4.33.3 or the history of Section 4.33.3 that suggests that the Access Board or the DOJ intended to treat motion picture theatre auditoria differently from all other types of auditoria. Viewing angles are not mentioned in Section 4.33.3, or anywhere else in the ADAAG. Similarly, although the issue of "view obstruction" was expressly discussed in the rulemaking proceedings that led to the promulgation of Section 4.33.3, viewing angles were never mentioned.[7] In fact, at the time Section 4.33.3 was first published

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7. Statements by the Access Board in 1999 offer additional confirmation that Section 4.33.3 was never intended to require consideration of viewing angles. In a Notice of Proposed Rulemaking issued on November 16, 1999, the Access Board noted DOJ's efforts to enforce a new interpretation of Section 4.33.3, and indicated it was considering whether to modify Section 4.33.3 to reflect DOJ's new position. *See* 64 Fed. Reg. at 62278. The Access Board's comments made clear that changes to Section 4.33.3 would be required to codify the new interpretation of Section 4.33.3 advanced by DOJ.

in 1991, virtually all movie theatres were built on sloped floors, and the primary design consideration relevant to all theatre patrons was an unobstructed line of sight to the screen. In this context, the universal understanding of architects and other design professionals was that Section 4.33.3 required that wheelchair-bound moviegoers be afforded the same unobstructed view of the screen enjoyed by ambulatory patrons.[8]

The first stadium-style movie theatres were built in approximately 1994-1995, and within a short time, most new theatre construction incorporated stadium-style designs. DOJ was aware of the construction of stadium-style movie theatres during this period, as well as any impact this new design might have on the location of wheelchair seating in movie theatres. In fact, theatre design professionals raised the issue of the location of wheelchair seating in stadium-style theaters with DOJ's technical personnel manning DOJ's telephone "helpline" during the first few years of stadium-style construction and were told that wheelchair locations could be placed anywhere within the general seating footprint of the theatre including the front row of the non-stadium section.

A rulemaking could have been – indeed, *should* have been – promptly commenced to amend Section 4.33.3 to address any new issues arising in connection with the location of wheelchair seating in stadium-style movie theatres. Rather than commencing a rulemaking to amend Section 4.33.3, however, DOJ chose to sit on its hands while thousands of stadium-style movie theatre auditoria were constructed based upon the reasonable and universal understanding among design professionals that Section 4.33.3 was intended to require that patrons in wheelchair seating be afforded the same unobstructed view to the screen enjoyed by the general public.

When DOJ finally did raise concerns about the location of wheelchair seating in stadium-style movie theatres, it did so not by issuing a notice of proposed rulemaking, but rather by

8. As discussed more fully below, even DOJ technical assistance personnel apparently held this view prior to the first public announcement of DOJ's new interpretation of Section 4.33.3 in 1998.

filing an *amicus curiae* brief in a lawsuit brought by private parties. Specifically, DOJ filed an *amicus* brief in the *Lara* case in July 1998, asserting for the first time that Section 4.33.3 requires the consideration of qualitative "viewing angles" in the placement of wheelchair seating in stadium-style movie theatres. The plain language of Section 4.33.3, the history of its promulgation, and statements by the Access Board that drafted the "comparable lines of sight" language make clear that the consideration of "viewing angles" was a requirement DOJ first claimed should be incorporated into Section 4.33.3, years after that section was enacted. DOJ has never offered any evidence to even suggest that it intended that Section 4.33.3 include a viewing angle component when it was promulgated. For these reasons, in *Lara*, the Fifth Circuit rejected DOJ's attempt to incorporate a viewing angle requirement into Section 4.33.3 that was not intended when Section 4.33.3 was promulgated.

DOJ refused, however, to accept the *Lara* decision, and has pressed variations of its viewing angle requirement in a host of subsequent lawsuits, including this one. At the same time, DOJ has refused to commence a rulemaking to establish clear and specific guidelines for the placement of wheelchair seating locations in stadium-style movie theatres, despite NATO's formal petition in August 1999 that it do so. The result has been five years of continued uncertainty, during which each new litigation seems to generate a revised and inconsistent interpretation of Section 4.33.3, and each new theatre constructed – no matter what design is used – bears the risk that it will have to be retrofitted.

## SUMMARY OF ARGUMENT

The majority opinion of the Ninth Circuit in this case raises two important issues of federal law that should be addressed by this Court pursuant to a writ of certiorari. First, the Ninth Circuit has interpreted Section 4.33.3 – an administrative rule established through notice and comment rulemaking – to include a viewing angle requirement neither found in the plain language of Section 4.33.3 nor intended to be included at the time of its

promulgation. The Ninth Circuit's interpretation of Section 4.33.3 is in direct and irreconcilable conflict with a prior holding of the Fifth Circuit on the very same issue. The effect of this new interpretation of Section 4.33.3 is to place thousands of motion picture auditoria out of compliance with the ADA, make it impossible for architects and theatre-design professionals to determine exactly what is required to comply with the ADA for current and future construction, and trigger an immediate retrofit obligation likely to cost hundreds of millions of dollars.

The second aspect of the Ninth Circuit's decision is just as troubling, and will have an even greater impact on both federal accessibility law under the ADA, and more generally, rulemaking under the Administrative Procedures Act ("APA"). The Ninth Circuit arrived at its interpretation of Section 4.33.3 by blindly deferring to DOJ's *post hoc* interpretation of that section to include requirements never intended at the time of its promulgation. In doing so, the Ninth Circuit has expressly approved the use of agency "interpretation" as a means of retroactively amending legislative rules, while avoiding the requirements of notice and comment rulemaking. The use of *post hoc* "interpretation" to change the meaning of an established rule undermines Congress's unequivocally expressed intent that clear and specific ADA standards for new construction be established through notice and comment rulemaking. Moreover, the retroactive amendment of a legislative rule without resort to rulemaking is inconsistent with the requirements of the APA and this Court's prior holdings.

## REASONS FOR GRANTING THE PETITION

The decision of the Ninth Circuit in this case is in direct and irreconcilable conflict with the Fifth Circuit's decision in *Lara* in two fundamental respects.[9] First, whereas the Fifth

9. On November 6, 2003, the Sixth Circuit issued a decision in *United States v. Cinemark USA, Inc.*, 2003 FED App. 0395P (6th Cir. November 6, 2003) that holds that the "comparable lines of sight" language in Section 4.33.3 requires a consideration of "viewing angles." Thus, there is presently a conflict among the Fifth, Sixth and Ninth (Cont'd)

Circuit held that the "comparable lines of sight" language in Section 4.33.3 addresses only the issue of view obstruction, the Ninth Circuit held that Section 4.33.3 also requires a consideration of the relative desirability of seat location as measured by viewing angles. Second, the Fifth Circuit held that DOJ could not reinterpret Section 4.33.3 or otherwise imbue it with a meaning not intended at the time of its promulgation unless it did so through the notice and comment rulemaking contemplated by the ADA itself. In contrast, the Ninth Circuit held that DOJ may reinterpret Section 4.33.3 to impose new requirements not contemplated when the regulation was promulgated, despite the fact that those new requirements were never articulated prior to the construction of the theatres at issue. Moreover, the Ninth Circuit also held that DOJ's new interpretation was entitled to judicial deference.

Both of these conflicts in the law are of critical importance to NATO's members because the Ninth Circuit's decision exposes the motion picture exhibition industry to the immediate and crushing financial liability of retrofitting thousands of existing stadium-style auditoria, leaves the industry with no practical guidance as to exactly what is required by Section 4.33.3 for future construction, and subjects theatre owners to unknowable future liabilities to retrofit whenever DOJ determines to reinterpret Section 4.33.3 or other ADA guidelines to include requirements not previously contemplated. As set forth more fully below, this Court should grant the writ of certiorari and resolve these important issues of federal law.

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(Cont'd)

Circuits on the meaning of Section 4.33.3 and the deference to be accorded to DOJ's interpretation of Section 4.33.3 to include new requirements never intended at the time of its promulgation. The same issue is currently before the First Circuit, and the Second Circuit has recently remanded a case involving the same issues for further consideration by the District Court.

## A. The Direct and Irreconcilable Conflict Among the Circuits Regarding the Requirements of Section 4.33.3 Places the Motion Picture Exhibition Industry in a Position of "Impossible Uncertainty" in Attempting to Comply With Section 4.33.3.

### 1. There is a Direct and Irreconcilable Conflict Among the Circuits Regarding the Meaning of Section 4.33.3.

The decision of the Ninth Circuit below is in direct conflict with the Fifth Circuit's holding in *Lara* regarding the meaning of Section 4.33.3. Based on its review of the plain language of Section 4.33.3, the history of its promulgation, and recent comments and actions by the Access Board, the Fifth Circuit held in *Lara* that the "comparable lines of sight" language in Section 4.33.3 was intended to address the issue of view obstruction and not relative viewing angles or other subjective viewer preferences. As a result, the Fifth Circuit found that wheelchair seating located amongst general public seating with an unobstructed view of the screen satisfies Section 4.33.3, as presently constituted.[10]

In contrast, the Ninth Circuit held that Section 4.33.3 requires the consideration of viewing angles, as well as view obstruction, and that viewing angles for wheelchair seating must be within the range of angles offered to the general public in stadium-style theatres.[11] Consequently, the same theatre design

10. The *Lara* Court did not suggest that Section 4.33.3 could not, or *should* not, be revised to incorporate additional requirements. The Fifth Circuit noted, however, that the only proper way to do so was through rulemaking designed to give all affected persons clear guidelines for complying with the ADA. *Lara*, 207 F.3d at 789.

11. As the dissenting opinion below authored by Judge Kleinfeld points out, however, the majority's interpretation of Section 4.33.3 places theatre owners in a position of "impossible uncertainty" because it provides no practical guidance to design professionals as to what they must do to comply with the law. Accordingly, as things now stand, at least in the Ninth Circuit, theatre owners must make subjective judgments regarding the relative desirability of viewing locations and hope that those judgments are consistent with the DOJ's current and future interpretations of Section 4.33.3.

that meets the purportedly uniform federal standard for accessibility in the Fifth Circuit must be retrofitted at great cost in the Ninth Circuit. In fact, even theatres built in the Fifth Circuit are at risk if the decision below is not overturned. The District Court for the Central District of California has indicated that its ruling that viewing angles must be considered under Section 4.33.3 will be applied to theatres located in the Fifth Circuit despite the holding of *Lara*. *See United States v. AMC Entertainment, Inc.*, 232 F. Supp. 2d 1092, 1114-15 (C.D. Cal. 2002). The real world effect of these two conflicting decisions is to leave theatre owners contemplating new construction in *any* jurisdiction in a quandary as to what is really required by Section 4.33.3.

**2. The Conflicting Interpretations of Section 4.33.3 Make it Impossible for Theatre Owners to Ensure That Newly-Constructed Theatres Comply With the ADA.**

The design and construction of a modern motion picture theatre is a complex and expensive process requiring the accommodation of a myriad of economic, aesthetic and legal constraints. Architects and other design professionals are required to consider and ensure compliance with all federal, state and local building codes, safety regulations and accessibility requirements prior to the commencement of construction. In most jurisdictions, ensuring compliance with applicable building codes prior to construction is a legal requirement. Theatre designs generally must be reviewed and approved by state and/or local authorities in order to obtain a permit that authorizes the start of construction. Ensuring pre-construction compliance with all applicable building codes is also a practical requirement because the costs of retrofitting a structure like a movie theatre after construction has been completed is generally orders of magnitude greater than ensuring compliance at the design stage.[12]

12. Even modest changes in the location of wheelchair seating in an existing theater can often require extensive other changes to the theater (Cont'd)

The same considerations apply to meeting federal accessibility requirements at the design stage, but to an even greater degree. While design professionals can ensure compliance with state and local building codes through the process of pre-approval of designs, ongoing inspections, binding guidance provided by local officials, and procedures for obtaining exemptions or variances, these mechanisms are not available at the federal level. There is no procedure for review and pre-approval of theatre designs with respect to compliance with federal ADA accessibility requirements. Theatre owners can gain no assurance of compliance through ongoing inspections and on-site guidance because federal officials do not perform those functions. Although DOJ does provide technical guidance via a telephone helpline, any such guidance is not binding on DOJ, and accordingly provides no protection from a future demand to retrofit. Finally, there is no established procedure for obtaining variances or exceptions from federal ADA accessibility requirements in unusual circumstances.

For all of these reasons, it is of paramount importance that federal ADA accessibility guidelines be sufficiently clear and specific to allow design professionals to know exactly what is required to comply with the ADA. Even a cursory review of the ADAAG demonstrates that the Access Board went to considerable length to promulgate accessibility guidelines that specify exactly what is required to comply with the law. As Judge Kleinfeld noted in his dissent below, the accessibility requirements surrounding Section 4.33.3 are written with great precision, providing guidance as to what is required to the inch and millimeter. Without that type of specificity and clarity, there is simply no way for theatre owners to be sure that a theatre complies with the ADA during the design stage, and thereby avoid the substantial and unnecessary costs of retrofitting newly constructed theatres.

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(Cont'd)
in order to meet related requirements for safe ingress and egress for wheelchair-bound patrons.

The conflict among the Circuits regarding the meaning of Section 4.33.3 places theatre owners in an untenable position. There is at present no way for a theatre owner to ensure that new construction meets federal accessibility requirements – no matter how much the theatre owner may wish to do so. While the Fifth Circuit's interpretation of Section 4.33.3 to require an unobstructed view is a clear standard to which compliance can be reliably measured, theatre owners cannot be assured that ultimately it will not be overturned. On the other hand, attempting to comply with the Ninth Circuit standard is just as problematical. As pointed out by the dissent below, compliance with the ambiguous and largely subjective viewing angle requirement is difficult to measure. This is particularly so because movie theatres are built in a variety of shapes, sizes and configurations.

Just as troubling, the general subjective standard approved by the Ninth Circuit is by its nature open to the same kind of reinterpretation that has resulted in this litigation. Indeed, the interpretation of Section 4.33.3 upheld by the Ninth Circuit is different from variations of the viewing angle requirement advanced by DOJ in other cases. As noted in the Petition for Writ of Certiorari filed in this case, DOJ's interpretations have ranged from the purely quantitative requirement that vertical viewing angles not exceed 35° to a purely qualitative and subjective requirement that wheelchair seating provide "an optimal viewing zone." *See* Petition at 7-8, n.7. Perhaps more to the point, there appears to be no end to DOJ's practice of advancing diverse and constantly changing interpretations of Section 4.33.3. The motion picture industry simply cannot design and build theaters complying with the ADA so long as federal accessibility requirements remain a moving target.

The conflict in the law must be resolved as soon as possible. The motion picture exhibition industry cannot sit on the sidelines hoping the law will eventually sort itself out. The construction of new theatres is a business necessity. The costs of mothballing ongoing construction would be astronomical. The economic

impact of a moratorium on further construction would be even more expensive and disruptive. Perhaps more important, given the irreconcilable conflict among the Circuits, and DOJ's refusal to resolve the matter through rulemaking, there exists the real possibility that the uncertainty concerning what is required by Section 4.33.3 may not be resolved for years to come unless this Court does so now.

**3. The Present Uncertainty in the Law Exposes the Motion Picture Theatre Industry to a Catastrophic Retrofit Burden for Both Existing and Newly-Constructed Theatres.**

The motion picture exhibition industry has built thousands of stadium-style auditoria over the last eight years in reliance on the universal understanding of theatre design professionals that Section 4.33.3 was intended to ensure an unobstructed view of the screen. Theatre designers were not alone in their common understanding regarding what Section 4.33.3 was intended to require. The Access Board – the body that actually drafted Section 4.33.3 – has made clear, in connection with a recent rulemaking to revise the ADAAG, that a revision to Section 4.33.3 is necessary to add consideration of viewing angles as a requirement. It is telling that DOJ's own technical personnel held the same view prior to 1998, a view echoed by the Fifth Circuit in *Lara*. Indeed, even the majority opinion below acknowledges that "DOJ may not have been contemplating viewing-angle issues in the context of stadium-style seating at the time § 4.33.3 was promulgated."[13]

Despite the fact that thousands of existing stadium-style auditoria were built in compliance with the requirements of Section 4.33.3 as they existed at the time, the Ninth Circuit's

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13. The Department of Justice certified the Texas Accessibility Standards (a state version of the ADA) as being in compliance with the ADA. Subsequently, State of Texas inspectors certified, in writing, that various Cinemark theatres complied with the TAS based on their apparent understanding that Section 4.33.3 addressed view obstruction, not viewing angles.

decision below will require the retrofit of most, if not all, of them. The cost of retrofitting thousands of auditoria will be enormous. Modern motion picture theatre complexes generally have between 10-20 auditoria, all of which incorporate stadium-style seating. Stadium-style seats are situated on steep tiers of poured concrete or structural steel. Because the steep slope of the stadium section exceeds 5%, the aisles cannot be ramped to provide access for wheelchair bound patrons.

As a result, changing the location of wheelchair seating – particularly into the middle or back of the stadium section – will necessarily involve substantial demolition and reconstruction, including relocating the main access aisle, the installation of wheelchair lifts or elevators, and/or "doubleback" style ramping. While the exact cost of retrofitting each auditorium will vary with the design and configuration of each theatre, there can be no doubt that retrofitting theatres is exceedingly expensive. For example, a wheelchair lift and auxiliary equipment may have an installed cost of up to $50,000 per auditorium; installation of an elevator costs approximately $100,000 or more per auditorium. Relocating the access aisle or extensive "doubleback" reramping can be even more expensive. NATO estimates that there are approximately 10,000 existing stadium-style motion picture auditoria in the United States. Accordingly, the total cost of retrofit for the industry would likely run in the hundreds of millions of dollars.

**B. The Ninth Circuit's Uncritical Deference to DOJ's Use of *Post Hoc* Interpretation as a Substitute for the Notice and Comment Rulemaking Required by the APA and ADA Undermines the Congressional Intent That Clear and Specific Guidelines Be Provided for the Construction of New Public Accommodations.**

The Ninth Circuit's decision to impose a viewing angle requirement for the placement of wheelchair seating appears to be based largely, if not entirely, on its uncritical determination that it is required to defer to DOJ's *post hoc* interpretation of the requirements of Section 4.33.3. Although the majority

opinion did not review in detail the history of Section 4.33.3's promulgation, its subsequent application, or other evidence of its intended meaning at the time it was promulgated, the majority does acknowledge "the fact that DOJ may not have been contemplating viewing-angle issues in the context of stadium-style seating at the time when § 4.33.3 was promulgated." In other words, while conceding that the viewing angle requirement now advanced by DOJ was not contemplated at the time that Section 4.33.3 was promulgated, the majority defers to DOJ's retroactive application of the new requirement as if it had always been the law.

The Ninth Circuit's blind and uncritical deference to DOJ in this instance is inconsistent with both the requirements of the APA and this Court's prior holdings, and also undermines the express intent of Congress that clear and specific ADA standards for new construction be established through notice and comment rulemaking. In deferring to DOJ's use of interpretation rather than rulemaking to change the meaning of Section 4.33.3, the Ninth Circuit has placed its *imprimatur* on a practice that circumvents the requirements of the APA and the ADA, and invites agencies to promulgate vague and open-ended rules, and then inject those rules with meaning on an *ad hoc* basis.

However, judicial deference to an administrative agency's interpretation of its own regulations is not proper where that interpretation is "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997). A court should not defer to an agency's interpretation of its own regulation "if an alternative reading is compelled by . . . indications of the [agency's] intent at the time of the regulation's promulgation." *Caruso v. Blockbuster-Sony Entertainment Center*, 193 F.3d 730 (3d Cir. 1999), *quoting*, *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504 512 (1994). As the District Court below found, and the Ninth Circuit decision acknowledges, DOJ's *post hoc* interpretation of Standard 4.33.3 is inconsistent with the intent of the Access Board and DOJ at the time of its

promulgation, and, thus, deference to DOJ's position is not required. *See also Lara v. Cinemark USA, Inc.* 207 F.3d 783 (5th Cir. 2000); *Caruso v. Blockbuster-Sony Entertainment Center*, 193 F.3d 730, 736 (3d Cir. 1999).

Moreover, deference to DOJ's *post hoc* interpretations of Standard 4.33.3 would be exceedingly inappropriate in this case. DOJ's reinterpretation of Section 4.33.3 to require consideration of viewing angles in the placement of wheelchair seating in newly constructed stadium-style movie theatres effects a substantive change to a legislative rule previously established through notice and comment rulemaking. But, "an agency is not allowed to change a legislative rule retroactively through the process of disingenuous interpretation of the rule to mean something other than its original meaning." *Caruso v. Blockbuster-Sony Entertainment Center*, 193 F.3d 730 (3d Cir. 1999), *citing* I., Kenneth Culp Davis and Richard J. Pierce, Jr., Administrative Law Treatise, § 6.10 at 283 (1994). Legislative rules like Standard 4.33.3 can be modified only by notice and comment rulemaking in compliance with the APA.

In *Caruso v. Blockbuster-Sony*, *supra*, the Third Circuit found that DOJ's attempt to interpret Section 4.33.3 to require an unobstructed view over standing spectators to be tantamount to an attempt to amend Section 4.33.3 without the notice and public comment required by the APA. *Id.* at 736-37. The Court noted that DOJ could adopt a new substantive regulation requiring that wheelchair users be given lines of sight equivalent to standing patrons, but to do so it had to proceed with notice and comment rulemaking. *Id.* at 737. The District Court in *Independent Living Resources v. Oregon Arena Corp.*, 982 F. Supp. 698, 736-42 (D. Ore. 1997) reached the same conclusion after an exhaustive analysis of the history of the promulgation of Section 4.33.3.[14]

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14. In *Paralyzed Veterans of America v. D.C. Arena, L.P.*, 117 F.3d 579 (D.C. Cir. 1997), the D.C. Circuit also rejected DOJ's contention that it could reinterpret its regulations without going through the process

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During the promulgation of Section 4.33.3, DOJ never gave notice to the public that consideration of viewing angles was to be a requirement for new construction or set forth the basis and purpose of such a requirement pursuant to 5 U.S.C. §§ 553(b) and (c). Accordingly, even if DOJ *had* subjectively intended Section 4.33.3 to address viewing angles when it was promulgated, that interpretation would not be an enforceable regulation under the APA. *See Independent Living Resources v. Oregon Arena Corp., supra* at 740-41.

The majority opinion below suggests that, by refusing to expand the meaning of Section 4.33.3 to include consideration of viewing angles, the District Court denied wheelchair – bound patrons the "equal enjoyment" promised by the ADA. But far from undermining the goals of the ADA, the District Court's refusal to stretch Section 4.33.3 beyond its original meaning is exactly what Congress intended. Recognizing the complexity and expense often involved in ensuring that new construction complies with ADA accessibility requirements, Congress mandated that clear guidelines be established to provide owners and operators of public accommodations notice of exactly what is required of them. As the *Lara* court noted:

> Congress granted DOJ, in conjunction with the Access Board, the authority to promulgate regulations under the ADA in order to provide the owners and operators of places of public accommodation with clear guidelines for accommodating disabled patrons. *See generally*

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(Cont'd)

of notice and comment rulemaking. *Id.* at 586. The *Paralyzed Veterans* Court held, however, that the evidence submitted at trial did not quite establish that DOJ's interpretation of Section 4.33.3 to require sightlines over standing spectators was contrary to its original intent in adopting Section 4.33.3. *Id.* at 587. Both the *Caruso* and *Independent Living* Courts declined to follow the *Paralyzed Veterans* decision, finding there was sufficient evidence that DOJ had changed its position on whether Section 4.33.3 requires sightlines over standing spectators.

> House Report No. 101-485 (I) at 124-25, 138-39 (1990), reprinted in 1990 U.S.C. Can 407-08, 421-22.

*Lara v. Cinemark USA, Inc.*, 207 F.3d at 789.

Moreover, Congress required that accessibility requirements for new construction be clearly articulated in regulations duly promulgated under the APA in a manner that ensures that all points of view are heard. As the trial court in *Caruso v. Blockbuster-Sony* observed:

> Congress has elected to pass a very general statute and leave it to the regulatory process to fill in the necessary details. Constructing a stadium or arena is an expensive, complex affair. If the law is to impose requirements to assist those with disabilities and to impose an obligation to make expensive retrofits if that law is violated, it is essential that those requirements be clearly articulated in the regulations. Compliance with APA rulemaking ensures, hopefully at least, that all points of view are heard and that the resulting regulations provide concrete guidance to those embarking on such a project.

*Caruso v. Blockbuster-Sony Music Entertainment Center*, 968 F. Supp 210, 216 (D. N.J. 1997), *aff'd in part, rev'd in part*, 193 F.3d 730 (3d Cir. 1999). *See also Independent Living Resources v. Oregon Arena Corp.*, 982 F. Supp 698, 736, n.55 (D. Oregon 1997) ("the notice and comment requirement would be eviscerated if the [DOJ] could create new obligations simply by announcing a new interpretation of an existing regulation").

The ruling of the District Court in this case, as well as the Fifth Circuit's decision in *Lara*, does not limit the substantive rights of disabled patrons under the ADA, they merely require DOJ to promulgate clear regulations after notice and public comment as Congress intended. The issues involved in the location of wheelchair seating in stadium-style theatres could and should have been addressed in a notice and comment

rulemaking long ago. The issues raised by the location of wheelchair seating in stadium-style movie theatres have been well-recognized since the mid-1990s, and NATO even formally requested DOJ to commence a rulemaking proceeding for the placement of wheelchair seating in stadium-style theatres in 1999. If the disabled are, in fact, being denied the "equal enjoyment" promised by the ADA, it is because DOJ has failed in its statutory obligation to provide clear guidelines through notice and comment rulemaking.

The effect of the Ninth Circuit's decision in this case is to completely undermine the certainty and specificity of the new construction guidelines required by Congress in the ADA. If DOJ can effect a retroactive change to the requirements of Section 4.33.3 through the expedience of "interpretation" in this case, then it can do so again in the future with respect to Section 4.33.3 or any other ADA requirement. If DOJ is free to change the rules at will, without notice and with retroactive application, there is simply no way for public accommodations to ensure that ADA requirements have been met and that expensive retrofit liabilities can be avoided.

## CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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